(7)

No. 93-397

Supreme Court, U.S.
FILED
FEB 23 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI and ALUMAX FOILS, INC.,
Petitioners,
vs.
JANETTE M. LOHMAN, Director of Revenue,
and
DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS,
GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES,
THE MISSOURI MUNICIPAL LEAGUE, and
THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR RESPONDENT JANETTE M. LOHMAN, DIRECTOR OF REVENUE

JEREMIAH W. (JAY) NIXON
Attorney General

DON M. DOWNING
Deputy Attorney General
(Counsel of Record)

GRETCHEN GARRISON
Assistant Attorney General

JEFFREY K. ELNICKI
Assistant Attorney General

P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-8871

Attorneys for Respondent
Janette M. Lohman, Director of Revenue

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a state compensatory use tax, when considered in conjunction with varying local sales taxes, violates the Commerce Clause where the state's sales-use tax system is not protectionist in purpose and in practical operation favors interstate commerce.

2. Whether, under the four-pronged analysis in *Planned Parenthood of South-Eastern Pennsylvania v. Casey*, __ U.S. __, 112 S.Ct. 2791 (1992), *General American* should be overruled.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	v
Statement of the Case	1
Preliminary Statement	1
The Parties	5
Proceedings Below	7
Summary of the Argument	9
Argument	16
I. MISSOURI'S SALES-USE TAX SYSTEM FAVORS INTERSTATE COMMERCE, IS NOT PROTECTIONIST AND THEREFORE CANNOT BE VIOLATIVE OF THE COMMERCE CLAUSE	16
A. The Dormant Commerce Clause Prohibits Only Economic Protectionism	16
B. This Court Has Consistently Ruled That "Compensatory" or "Complementary" Taxes, Which Do Not Overcompensate for the Burden Imposed on Intrastate Commerce By Local Taxes, Do Not Constitute Economic Protectionism	18

C. Missouri's Additional Use Tax Is A "Compensatory" Tax, Does Not Overcompensate For The Burden Upon Intrastate Commerce Caused By Missouri's Varying Local Sales Taxes, Is Not Protectionist And Therefore Does Not Violate The Commerce Clause 27

D. No "Better" Alternatives Have Been Suggested 28

II. PETITIONERS' CASES ARE FACTUALLY INAPPOSITE, DO NOT UNDERMINE GENERAL AMERICAN, AND SUPPORT AFFIRMANCE HERE 31

III. GENERAL AMERICAN SHOULD NOT BE OVERRULED 39

Conclusion 44

TABLE OF AUTHORITIES

Page(s)

Cases:

American Modulars Corp. v. Lindley, 376 N.E.2d 575 (Ohio 1978) 4,30

American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987) 14,33

American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 169 (1990) 39

Armco, Inc. v. Hardesty, 467 U.S. 638 (1984) 35

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 16,22,33,36,42

Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318 (1977) 8,38

Chemical Waste Management, Inc. v. Hunt, ____ U.S. ___, 112 S.Ct. 2009 (1992) 37,44

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 39

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 17,28,42

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 11,18,23,42

Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) 39

Dennis v. Higgins, 498 U.S. 439 (1991) 12

D.H. Holmes Co., Ltd. v. McNamara, 486 U.S. 24 (1988) 3,17,31

Dunbar-Stanley Studios, Inc. v. Alabama, 393 U.S. 537 (1969) ..... *passim*

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 12

Fort Gratiot Landfill v. Michigan Dep't of Natural Resources, ___ U.S. ____, 112 S.Ct. 2019 (1992) .. 16,37,42

General American Tank Car Corp. v. Day, 270 U.S. 367 (1926) ..... *passim*

Goldberg v. Sweet, 488 U.S. 252 (1989) 14

Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932) 23

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963) ..... *passim*

Harper v. Virginia Dep't of Taxation, ___ U.S. ___, 113 S.Ct. 2510 (1993) 39

Henneford v. Silas Mason Co., 300 U.S. 577 (1937) ..... *passim*

Hinson v. Lott, 75 U.S. (8 Wall.) 148 (1869) ..... *passim*

Interstate Busses Corp. v. Blodgett, 276 U.S. 245 (1928) 26

Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance, ___ U.S. ___, 112 S.Ct. 2365 (1992) 14,38

Maryland v. Louisiana, 451 U.S. 725 (1981) ..... *passim*

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 12

Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) 30

New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) 14,28,35

Oregon Revenue Dep't v. ACF Industries, Inc., No. 92-74, Slip Op. (United States Supreme Court, January 24, 1994) 30

Philadelphia v. New Jersey, 437 U.S. 617 (1978) 9,16,37,42

Planned Parenthood of South-Eastern Pennsylvania v. Casey, ___ U.S. ___, 112 S.Ct. 2791 (1992) 15,40

Polar Ice Cream & Creamery v. Andrews, 375 U.S. 361 (1964) 38

Postal Telegraph Cable Co. v. Adams, 155 U.S. 688 (1895) 21

Quill Corp. v. North Dakota, ___ U.S. ___, 112 S.Ct. 1904 (1992) ..... *passim*

San Antonio Independent School Dis't v. Rodriguez, 411 U.S. 1 (1973) 30

Travelers' Insurance Co. v. Connecticut, 185 U.S. 364 (1902) 19

Trinova Corp. v. Michigan Dep't of Treasury, 498 U.S. 358 (1991) 8

Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue, 483 U.S. 232 (1987) 9,26,27,35,42

Westinghouse Electric Corp. v. Tully, 466 U.S. 388 (1984) 8,37

Williams v. Vermont, 472 U.S. 14 (1985) 22,32

Wyoming v. Oklahoma, ___ U.S. ___, 112 S.Ct. 789 (1992) 9,16,36,42

Constitutional Provisions and Statutes:

United States Constitution

Article I, Section 8, Clause 3 16

Constitution of Missouri (1945, as amended)

Article IV, Section 43(a) 2

Article IV, Section 47(a) 2

Missouri Revised Statutes (1986 & Supp. 1992)

Sections 66.600-66.635 2

Sections 67.500-67.545 2

Sections 92.400-92.420 2

Sections 94.500-94.510 2

Section 94.577 2

Sections 94.600-94.655 2

Sections 94.700-94.745 2

Section 144.010.1(3) 3,27,32

Section 144.020.1(1) 2

Section 144.030.2 3

Section 144.605(8) 3,27,32

Section 144.610 3

Section 144.615(3) 3

Section 144.615(5) 3

Section 144.747 3

Section 144.748. ..... *passim*

Other Authorities:

Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 (1982) 17

Hartman, *Federal Limitations on State and Local Taxation* (1981 & Supp. 1992) 17,20

Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 Tax Lawyer 405 (Spring 1986) 13,17,20,21,27

Missouri State Tax Reporter (CCH) 3

United States Supreme Court Rule 14.1(a) 22

No. 93-397

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI and ALUMAX FOILS, INC.,
Petitioners,
vs.
JANETTE M. LOHMAN, Director of Revenue,
and
DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS,
GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES,
THE MISSOURI MUNICIPAL LEAGUE, and
THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR RESPONDENT JANETTE M. LOHMAN, DIRECTOR OF REVENUE

STATEMENT OF THE CASE

Preliminary Statement

For over twenty years since Missouri first adopted its City Sales Tax Law in 1969, out-of-state vendors have enjoyed a commercial advantage over Missouri businesses. The tax at issue in this case, Missouri's Additional Use Tax, has not changed that reality, but merely reduced the *dis*advantage Missouri businesses continue to suffer.

Missouri's state-wide sales tax rate is 4.225%. §144.020.1(1); Mo. Const. art. IV, §§43(a) and 47(a).[1] In recognition of local revenue needs, cities and counties within Missouri are authorized, upon voter approval, to impose additional local sales taxes for various local purposes.[2] Virtually every local jurisdiction has imposed local sales taxes. (S.L.F. 11-37). Because needs vary by locality, the local tax is permissive, and the rate may vary within the statutory parameters.

Sales within localities are therefore taxed at the combined state and applicable local rate. As of 1992, the aggregate state and local sales tax rate in some localities was as high as 7.725%. (JA 67).[3] Based on evidence before the trial court,[4] the average local sales tax rate exceeded 1.8%.[5] On a statewide average,

[1] All statutory references are to RSMo. (1986) unless otherwise specified.

[2] Those purposes include, but are not limited to, law enforcement, street improvement, transportation and public works. *See* §§ 66.600-66.635; 67.500-67.545; 92.400-92.420; 94.500-94.510; 94.577; 94.600-94.655; 94.700-94.745.

[3] The record is generally limited to 1990 sales figures and sales tax rates from 1991 (see L.F. 560-92) and 1992 (*see* S.L.F. 56-88, 180-200). As noted below, these are not static, but may change.

[4] *Associated Industries of Missouri v. Director of Revenue*, Slip Op., No. CV192-15CC (Circuit Court of Cole County, July 15, 1992). The trial court judgment is printed in the Petition for Writ of Certiorari at A35-40. All citations to that judgment will be in reference thereto.

[5] The trial court found that in 1990, total sales subject to Missouri sales taxes was $35,663,398,847.22. *Associated Industries*, Slip Op. at A38 n. 1. (*See also* JA 67). If the "1992 aggregate local sales tax rates are applied on a locale by locale basis to the sales in each locale, such would generate $645,869,767.55 in local sales taxes." *Id.* (The trial court found that changes in the rates from 1990 to 1992 were "minimal"). *Id.* Dividing the total local sales tax revenue ($645,869,767.55) by the total sales ($35,663,398,847.22) yields an average local sales tax rate of approximately 1.811%.

sales in Missouri were taxed at an aggregate sales tax rate in excess of 6% (4.225% plus 1.8%).[6]

Until 1990, Missouri's state-wide use tax rate was only 4.225%.[7] Thus, Missouri businesses suffered not only competitive disadvantage, but shouldered alone the cost of municipal benefits shared, but not recompensed, by out-of-state businesses.

In 1990, the Missouri legislature attempted to remedy this disparity by enacting §144.747. That statute authorized each political subdivision to levy a use tax equivalent to its local sales tax. Although signed into law, §144.747 was not implemented. Had it been, the average local use tax rate likely would have been at least 1.8%,[8] and the average aggregate use tax rate would have exceeded 6%.

This scheme of varying local use tax levies also would have forced out-of-state vendors subject to Missouri jurisdiction, who are required to collect the tax, to ascertain the applicable local use

[6] The trial court specifically found as a matter of fact that the local sales tax rates are not likely to decrease in future years. This finding has proven true. Indeed, Missouri sales tax rates have increased rather than decreased. Compare S.L.F. 11-37 with Missouri State Tax Reporter (CCH), ¶60-430 at 6167-193.

[7] Missouri's first "Compensating Use Tax Law" was enacted in 1959. Law of Mo. 1959, H.B. 35. The use tax is a tax upon the sales price of all products stored, used or consumed within Missouri. §144.610. The definition of "sales price" under the use tax law echoes the definition of "gross receipts" upon which levy is made under the sales tax law. *Compare* §144.010.1(3) and §144.605(8). Sales tax exemptions are explicitly made applicable to the use tax. §144.030.2 and §144.615(3). The use tax achieves fair apportionment by giving a credit for any sales tax paid to another state respecting the purchase. §144.615(5). *See D. H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 31 (1988).

[8] Although the 1990 enactment did not require localities to levy a use tax, they had every incentive to do so for reasons including revenue production and competitive fairness to local businesses.

tax for each transaction. The administrative cost of such a task could well have exceeded the amount of the use tax itself, and would certainly have resulted in a significantly higher administrative burden than if the use tax rate was uniform. (L.F. 147-150). Moreover, a non-uniform use tax risked Commerce Clause criticism due to the purchaser's ability to purchase instate at a sales tax rate lower than the use tax rate at his place of residence. *See American Modulars Corp. v. Lindley*, 376 N.E.2d 575 (Ohio 1978).

To overcome these substantial practical and legal problems, the Missouri legislature in 1991 repealed §144.747, and enacted a new use tax statute, effective July 1, 1992. That statute, §144.748, like its repealed predecessor, sought to lessen the competitive disadvantage to Missouri business, and to require interstate commerce to pay its just share of the tax burden. This time, however, the legislature took an approach which not only continued to recognize the importance of local needs, but gave more consideration to the practical needs of firms involved in interstate commerce.

Section 144.748 effectively sets a uniform, state-wide use tax of 5.725%. While the 1.5% increase from the pre-1990 4.225% rate places intrastate commerce on a more level playing field, the aggregate tax burden is still born disproportionately by Missouri businesses. Over ninety-two percent of all taxable transactions in this state carry a sales tax rate equal to or greater than 5.725%[9]. Thus, "intrastate sales in Missouri in calendar year 1990 were subject to a local sales tax burden of approximately $100,000,000 *over* what would have been generated by application of a uniform local sales tax rate of 1.5% in all locales." *Associated Industries*, Slip Op. at A38-39 (emphasis original).

[9] The legislature considered this fact when it selected 1.5% as the additional statewide 1.5% use tax rate (L.F. 245-46).

Notwithstanding the continued favored status of interstate commerce, Petitioners challenge §144.748. Based upon factual hypothesis and legal mischaracterizations, Petitioners disparage a state tax system which operates to the net advantage of out-of-state sellers. Petitioners simply foreswear their responsibility to bear a just share of the municipal benefits they enjoy, and ask this Court to adopt a myopic rule of interstate burden heretofore unrecognized in Commerce Clause jurisprudence. According to Petitioners, §144.748 is unconstitutional if the sale tax rate in even one political subdivision is less than 1.5% regardless of the aggregate advantage to interstate commerce.

The Parties

Petitioner Associated Industries of Missouri ("AIM") is a not-for-profit "business league" comprised of individuals and enterprises engaged in business in Missouri. AIM's members pay Missouri sales and use taxes on purchases of tangible personal property made within and without the State of Missouri. (JA 33, ¶4). Certain unidentified members of AIM are multistate corporations whose principal operations or headquarters are located outside Missouri. (JA 32, ¶4).[10] "Several" of these members collect and remit Missouri use tax on sales made outside Missouri to purchasers within Missouri. (JA 33, ¶4).

Petitioner, Alumax Foils, Inc. ("Alumax") is headquartered in St. Louis, Missouri. (JA 33, ¶5). The combined local sales tax rate at that location is 1.5%. (S.L.F. 69). In connection with its

[10] The record does not indicate where in Missouri such sales are made, whether any AIM member competes with any vendor located in Missouri, or whether the particular situs from which competing goods, if any, are sold has a local tax rate of less than 1.5%. Nor is there any evidence identifying the location from which "multistate" AIM members do business in Missouri, or the sales tax rate applicable to sales made therefrom. The evidence does show, however, that over ninety percent of the sales in this state occur in locations where the sales tax rate is 5.725% or higher. Over half of Missouri sales will be taxed at a rate higher than 5.725%. *Associated Industries*, Slip Op. at A37.

business of manufacturing and selling foil products, Alumax purchases tangible personal property from sellers located both outside and within Missouri. As of June, 1992, Alumax paid approximately $3,000 per month in Missouri use tax. (JA 33, ¶5). Alumax states that its use tax liability is approximately $786 more per month by reason of the 1.5% increase in Missouri's use tax rate. Appellants' Brief, p. 5.[11]

According to the stipulation of facts, compliance with §144.748 will impose "significant economic costs" on AIM members and Alumax. These "costs" include "payment of the tax" and "administrative costs of compliance." (JA 34, ¶8). Assuming the former means payment born by Missouri purchasers like Alumax, there is no evidence that the amount paid in use tax under §144.748 is any greater than the amount that would be paid in sales tax if the purchase was made in Missouri. Assuming "payment" means collection of the use tax by AIM's multistate firms, there is no evidence of competitive disadvantage. Whatever is meant by "administrative costs of compliance", there is no evidence that any alternative to §144.748 would be less burdensome than a flat, state-side use tax rate. Indeed, the evidence is to the contrary. (L.F. 147-150).

Intervenors include the Missouri Association of Counties and the Missouri Municipal League (both organizations representing the interests of Missouri counties), the City of Blue Springs, Delong's Inc. (a steel fabricating company located in Jefferson City), Associated General Contractors of Missouri, and Gary

[11] The record contains no indication, however, that the amount of use tax paid by Alumax is any greater than the amount it would have to pay in sales tax had the purchases been made in Missouri. The record reveals that in June 1992, Alumax made a single purchase from a vendor located in St. Francois County on which Alumax paid sales tax at an aggregate rate of 4.975%. (L.F. 198-99). The record contains no indication as to the nature of the item purchased, or whether a comparable product was available from an out-of-state source.

Markenson (a taxpayer residing in Jefferson City). All intervenors have a direct economic interest in this case.

Proceedings Below

Seven months prior to the effective date of §144.748, AIM and Alumax filed their petition in the Circuit Court of Cole County, Missouri. The petition sought a declaration that §144.748 violates the Commerce, Due Process, and Equal Protection Clauses of the United States Constitution and the Due Process, Equal Protection and Uniformity clauses of the Missouri Constitution, and in addition, injunctive relief from enforcement of the statute.

Petitioners did not argue below (nor do they argue here) that §144.748 places an undue burden on interstate commerce on a state-wide basis. Rather, their constitutional challenge relies on hypothetical transactions occurring within "certain" localities having a local sales tax rate of less than 1.5%.

The trial court found as a matter of fact that while some sales in Missouri may be subject to local sales tax of less than 1.5%, the evidence showed that as of 1990, intrastate sales in Missouri were "subject to a local sales tax burden of approximately $100,000,000 *over* what would have been generated by application of a uniform local sales tax rate of 1.5% in all locales." *Associated Industries*, Slip Op. at A38 n.1 (emphasis original). Further, the evidence established that "the overwhelmingly predominant local sales tax rates in Missouri will remain at 1.5% or higher for so long as Section 144.748 . . . remains in effect." *Id.* at A38. Based upon the evidence, and under the rationale of *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), the trial court determined that §144.748 is "not discriminatory vis-a-vis local sales taxes and . . . does not constitute a burden upon interstate commerce." *Id.*

In a six to one decision, the Missouri Supreme Court affirmed. *Associated Industries of Missouri v. Director of Revenue*, 857

S.W.2d 182 (Mo. banc 1993). The Court found that where a permissive system of local sales taxes is allowed, dollar-for-dollar exactness is "most likely impossible". *Id.* at 192. It considered the same cases relied upon by Petitioners here, and found them distinguishable: "In each of these cases the taxes that were found unconstitutional imposed higher use taxes both on an individual basis and on an average statewide basis . . . Whether the discrimination against interstate commerce was small or large in dollar amount, it was mandated in every transaction and unmitigated by the structure of the tax." *Id.* at 191 (citing *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977)). In the present situation, the Court said, this is not so. *Id.* Rather, §144.748 "was calculated to produce a statewide result of a lesser burden on interstate commerce than exists for intrastate commerce." *Id.*

The Court not only found *Halliburton* and its progeny distinguishable, but looked to more recent pronouncements favoring substance over form. *Id.* (citing *Quill Corp. v. North Dakota*, ___U.S.___, 112 S. Ct. 1904 (1992); *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358 (1991)). Thus, the Court concluded that the more appropriate analysis, as found in *General American*, seeks to determine whether a tax scheme burdens interstate commerce in practical, collective effect. Because the state-wide result of §144.748 is a lesser burden on interstate than intrastate commerce, it does not discriminate in purpose or practical effect. While in certain localities, the use tax may exceed the sales tax, the Commerce Clause protects "interstate commerce" and "does not require identical treatment of all taxpayers." *Associated Industries*, 857 S.W.2d at 192.

Petitioners sought, and were granted, certiorari on the Commerce Clause issue. Petitioners urge application of a standard

that would invalidate any tax allowing any possible "instance" of unequal burden and ask, *inter alia*, that this Court's decision in *General American* be declared consistent with that rule, or be overruled. Petition for Writ of Certiorari, pp. 13-16.

SUMMARY OF ARGUMENT

The dormant Commerce Clause prohibits "economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Wyoming v. Oklahoma*, ___ U.S. ___, 112 S.Ct. 789, 800 (1992). *See also Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978). To determine whether a state tax constitutes economic protectionism and therefore violates the Commerce Clause, the "state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981).

For over 100 years, this Court has recognized that a tax which burdens *inter*state commerce does not violate the Commerce Clause if it "compensates" for the burden that another substantially equivalent tax imposes on *intra*state commerce. *See, e.g., Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926); *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1869). Thus, "[t]he concept of a compensatory tax first requires identification of the burden for which the State is attempting to compensate." *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 242 (1987) (quoting *Maryland v. Louisiana*, 451 U.S. at 758 (1981)).

Here, that burden is easily identifiable. Through enactment of §144.748, Missouri properly attempted to compensate for the burden imposed upon intrastate commerce by varying local sales taxes. The record indicates that the average rate of those taxes exceeds 1.8%. The Additional Use Tax rate is 1.5% — more than

20% less than the average local sales tax rate. Because Missouri's Additional Use Tax thus *under*compensates for the burden imposed upon intrastate commerce by local sales taxes, it plainly does not violate the Commerce Clause.

On materially identical facts, this Court has so held. In *General American*, this Court ruled that a Louisiana tax imposed upon nonresident railroad companies, which was approximately equal to the "average" tax imposed upon resident railroad companies, did not violate the Commerce Clause. Louisiana permitted its local jurisdictions to impose varying local tax rates upon resident railroad companies to satisfy local needs. In some local communities, the aggregate local tax rate on resident companies was higher than the tax rate on nonresident companies; in other localities it was lower. On average, however, it was approximately equal. 270 U.S. at 371.

Justice Stone, writing for a unanimous Court, had little trouble reaching the unremarkable conclusion that the tax on nonresident companies did not violate the Commerce Clause. In language and rationale perfectly consistent with this Court's more recent Commerce Clause cases, Justice Stone wrote:

> "Where a taxing statute, which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against nonresident taxpayers, and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness." *Id.* at 373.

Based upon *General American* and more recent cases, the Missouri Supreme Court ruled that Missouri's sales-use tax structure "does not discriminate against interstate commerce in purpose or practical effect" because it "imposes a lesser tax burden on interstate commerce than it does on intrastate commerce." *Associated Industries*, 857 S.W.2d at 192. That sound

holding is fully consistent with the precedents of this Court, and should not be disturbed.

Far from burdening *inter*state commerce, the stipulated facts reveal that the combined effect of Missouri's aggregate sales and use taxes is a net burden on *intra*state commerce. For one year alone, the trial court found as a matter of fact that the net burden on intrastate commerce exceeded $100,000,000. *Associated Industries*, Slip Op. at A38 n.1. Thus, in-state sellers remain at a substantial competitive disadvantage to out-of-state sellers.

It is therefore absurd to suggest, as Petitioners have, that §144.748 is "patently protectionist." Petitioners' Brief, p.13.[12] Nor can it reasonably be said to "pass an *unfair* share of the tax burden onto interstate commerce" and thereby "*unduly* burden interstate commerce." *Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904, 1913 (1992) (interpreting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)) (emphasis added). Under this Court's teachings, Missouri's sales-use tax system does not come close to violating the Commerce Clause.

Acknowledging, as they must, that Missouri's sales-use tax structure overall is substantially pro-interstate commerce, Petitioners and their Amicus advocate adoption of a heretofore unrecognized requirement that there not be one possible "instance" in which an interstate firm is burdened more than an intrastate firm.[13] Not only is such a requirement flatly inconsis-

[12] Justice Cardozo, considering a similar claim in *Silas Mason*, warned about such conclusory labels: "Catch words and labels, such as the words 'protective tariff,' are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard." *Silas Mason*, 300 U.S. at 586.

[13] Indeed, Petitioners' Amicus twice baldly states that any state tax that fails to provide equal treatment to interstate and intrastate commerce in "each and every instance" violates the Commerce Clause. *See* Br. *Am. Cur.* of Washington Legal Foundation pp. 4, 9. Not surprisingly, neither statement contains a single supporting citation.

tent with *General American* and more recent precedents,[14] it reflects a fundamental misunderstanding of the purpose of the Commerce Clause. As this Court recently observed, that Clause addresses "structural concerns about the effects of state regulation on the *national economy*." *Quill*, 112 S.Ct. at 1913 (emphasis added). It "protects the interstate market, not particular interstate firms." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978)).[15]

Here, the record establishes that Missouri's sales-use tax statutes benefit the "national economy" and the "interstate market" at the expense of intrastate commerce. This Court has never invalidated a state tax structure having that practical effect. It should not do so now.[16]

---

[14] *See, e.g., Dunbar-Stanley*, 393 U.S. at 542 (rejecting a Commerce Clause challenge to a complementary state taxing structure which allowed for "instances" of unequal burden, but which overall did not "bear unfairly" upon interstate commerce).

[15] That is not to say, of course, that individual interstate firms do not have a *remedy* for a Commerce Clause violation. *See Dennis v. Higgins*, 498 U.S. 439 (1991).

[16] Moreover, Petitioners' flawed micro-approach fails to account for the competitive *advantage* that individual interstate firms have over local firms in jurisdictions in which the majority of taxable sales occur. To use Petitioners' example, any supposed disadvantage a Kentucky firm would have selling to a resident of Dunklin County, Missouri, where the sales tax rate is 4.225%, would be more than offset by the *advantage* to that same Kentucky firm in selling to residents of other localities where the sales tax rates all are above 5.725%. (*See* S.L.F. 11-37). Over 92% of Missouri sales take place in jurisdictions which have a sales tax rate of 5.725% or greater. Moreover, interstate firms enjoy a net $100 million competitive advantage over intrastate firms. Given this enormous collective advantage, it is doubtful whether *any* individual interstate firm is at a net competitive disadvantage when seeking to make sales in Missouri. Petitioners certainly have not shown that any are. Thus, if the Commerce Clause required the type of individual-

(Footnote 16 continued on next page)

The fact that Missouri's sales-use tax system produces a net advantage to interstate commerce distinguishes the cases relied upon by Petitioners. In each case, the challenged state tax or regulation burdened interstate firms both individually and *as a class*. There was no corresponding benefit that outweighed the burden — either to an individual firm or to the interstate market overall. For this reason, it is hardly surprising that those cases found the challenged statute to be protectionist, and therefore violative of the Commerce Clause. Precisely the opposite situation is presented here, where intrastate firms are far more heavily burdened than interstate firms.[17]

Contrary to Petitioners' and their Amicus' characterizations, neither Respondents nor the courts below advocate adoption of a *de minimis* exception to the Commerce Clause. As both courts below expressly found, there simply is *no* discrimination pre-

---

(Footnote 16 continued)

ized firm-by-firm analysis Petitioners suggest (it plainly does not), Petitioners have failed to prove any violation. *See Dunbar-Stanley*, 393 U.S. 537 (record insufficient to establish actual injury). Moreover, Petitioners have failed to show that they themselves have suffered any net injury-in-fact as a result of any supposed unconstitutionality in Missouri's sales-use tax system. They thus lack standing. *See* Br. *Am. Cur.* of The National Conference of State Legislatures *et al.*, Part I. To avoid duplication, Respondent will not repeat its Amicus' reasoned argument that Petitioners lack standing, but adopts that argument by this reference.

[17] Relying, with a single exception, upon cases that did not involve sales and use taxes, Petitioners also imply that Missouri's use tax somehow is not "complementary" to the sales tax because it taxes "different events or transactions." Petitioner's Brief, p. 24. Not even Petitioners' Amicus buys that argument. *See* Br. *Am. Cur.* of Washington Legal Foundation, p. 5. Indeed, after *Silas Mason*, no court has questioned that unassailable holding that sales and use taxes like those at issue here do in fact apply to substantially equivalent events and transactions. One respected commentator has called sales and use taxes the "paradigm" of complementary taxes. Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 Tax Lawyer 405, 406 (Spring 1986).

sented here, *de minimis* or otherwise.[18] Nor does Respondent here attempt to "justify" the additional use tax on "administrative convenience" grounds.[19] Advancement of a legitimate state purpose to "justify" a scheme of taxation presupposes that the scheme discriminates. *Cf. New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988). Because Missouri's Additional Use Tax does not in purpose or in practical effect discriminate against interstate commerce, the State need not "justify" it.[20]

---

[18] *Associated Industries*, 857 S.W.2d at 192 ("We find that the tax scheme in the present case does not discriminate against interstate commerce in purpose or in practical effect"); *Associated Industries*, Slip Op. at A38-39 ("The Court therefore specifically finds that the Additional Use Tax is not discriminatory vis-a-vis local sales taxes and that the Additional Use Tax does not constitute a burden upon interstate commerce").

[19] Respondent does not, however, concede that administrative convenience to the State is unworthy as a justification were one necessary. Petitioners suggest that administrative convenience is never an acceptable reason for validating an otherwise discriminatory tax. Petitioners' Brief, pp. 28-29. For this proposition, Petitioners cite *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963) and *Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance*, ___U.S.___, 112 S. Ct. 2365 (1992). Contrary to Petitioners' characterization, those cases hold only that legitimate state goals will not justify a discriminatory statute if there are available nondiscriminatory alternatives to achieve the same result. *Halliburton*, 373 U.S. at 74 n. 9; *Kraft*, 112 S. Ct. at 2371. *See also New Energy*, 486 U.S. at 278. Other cases directly approve administrative convenience as a basis to validate an otherwise discriminatory tax. *See, e.g., Goldberg v. Sweet*, 488 U.S. 252, 264-65 (1989). At a minimum, a state is not required to avoid taxes which do not produce exact parity in every instance when the tax is the "only practicable means of collecting revenues. . .and the [alternatives] would pose genuine administrative burdens." *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 296 (1987). Such administrative burdens can include cost to the state, and cost to the taxpayer. *Id.* at 296 n. 26. *Kraft* itself acknowledges administrative convenience as a legitimate state interest. 112 S. Ct. at 2371.

[20] If a justification were necessary, it exists here. *See infra*, pp. 28-31.

Finally, Petitioners have offered nothing to warrant overruling *General American*. Its holding is entirely consistent with this Court's past and present approach of weighing the competing burdens to interstate and intrastate commerce of complementary state taxes. It provides a useful, workable, bright-line test that has withstood the test of time, and upon which states have relied in devising their tax systems. Thus, under the four-factor test set forth in *Planned Parenthood of South-Eastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791 (1992), *General American* should not be overruled.

ARGUMENT

I. MISSOURI'S SALES-USE TAX SYSTEM FAVORS INTERSTATE COMMERCE, IS NOT PROTECTIONIST AND THEREFORE CANNOT BE VIOLATIVE OF THE COMMERCE CLAUSE.

A. The Dormant Commerce Clause Prohibits Only Economic Protectionism.

The Commerce Clause by its terms grants to Congress the power to "regulate Commerce . . . among the several States." U.S. Const. art. I, §8, cl.3. This Court long ago determined, however, that the Commerce Clause "is more than an affirmative grant of power; it has a negative sweep as well." *Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904, 1911 (1992) (citing *Gibbons v. Ogden*, 9 Wheat. 1, 231-232 (1824) (Johnson, J. concurring)). This Court has interpreted the "negative" or "dormant" Commerce Clause to prohibit "state regulations that unduly burden interstate commerce." *Id.* at 1913.

That rule is grounded in the underlying purpose of the dormant Commerce Clause, which this Court has defined as prohibiting "economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Wyoming v. Oklahoma*, ___ U.S. ___, 112 S.Ct. 789, 800 (1992). *See also Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978) ("The opinions of the Court through the years have reflected an alertness to the evils of 'economic isolation' and protectionism ..."). Thus, this Court consistently has invalidated state statutes that constitute "pure isolationism" (*Fort Gratiot Landfill v. Michigan Dep't of Natural Resources*, ___ U.S. ___, 112 S.Ct. 2019 (1992)) and "simple economic protectionism" (*Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263

(1984)).[21] By contrast, the Court has been equally consistent in upholding state statutes that do not run afoul of this fundamental purpose of the clause. *See* cases discussed *infra*, pp. 18-27.

What constitutes "economic protectionism" in the realm of state taxation has perplexed both this Court and commentators for more than a century.[22] Under the Court's current approach, states are now plainly permitted to require that interstate commerce pay "its *fair* share of state taxes." *D.H. Holmes Co. Ltd. v. McNamara*, 486 U.S. 24, 31 (1988) (emphasis added). *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-24 (1981) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their *just* share of [the] state tax burden even though it increases the cost of doing business") (internal quotation and citation omitted) (emphasis added).

Conversely, "taxes that pass an *unfair* share of the tax burden onto interstate commerce" and thereby "*unduly* burden interstate

---

[21] As one respected commentator colorfully put it, "[i]f the Court gets the aroma — real or imagined — of economic protectionism, likely the Commerce Clause will spell downfall for the tax." Hartman, *Federal Limitations on State and Local Taxation*, §2:19 at 157 (1992 Supp.).

[22] In *Quill*, this Court recently observed after a historical analysis that "our law in this area is something of a 'quagmire' and the 'application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." 112 S.Ct. at 1915 (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458 (1959)). For these reasons, "constitutional scholars have all but abandoned the state tax field" and constitutional law professors have dropped the subject of state taxation from their casebooks. Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 Tax Lawyer 405, 405 (Spring 1986). *See also* Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425, 426 n.2 (1982) ("No attempt is made here to synthesize the equally confusing and often more complex problem of dormant commerce clause limitations on state taxation").

commerce" are protectionist and are therefore prohibited. *Quill*, 112 S.Ct. at 1913 (interpreting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)) (emphasis added). As discussed below, Missouri's sales-use tax system plainly does not violate that standard, is not protectionist, and therefore does not violate the Commerce Clause.

B. This Court Has Consistently Ruled That "Compensatory" or "Complementary" Taxes, Which Do Not Overcompensate for the Burden Imposed on Intrastate Commerce By Local Taxes, Do Not Constitute Economic Protectionism.

These concepts of fairness, justness and undue burden take on special significance in the area of "compensating" or "complementary" taxes. For over 100 years, this Court has recognized that certain state taxes, when viewed in isolation would pass an unfair share of the tax burden onto *inter*state commerce, do not violate the Commerce Clause when viewed in conjunction with other substantially equivalent taxes which burden *intra*state commerce.

For example, at issue in *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1869), was an Alabama tax of fifty cents per gallon upon spirituous liquor dealers "introducing any such liquors into the State for sale." *Id.* at 148. The Court observed that "[i]f this section stood alone in the legislation of Alabama on the subject of taxing liquors," it would violate the Commerce Clause. *Id.* at 150, 152. The Court recognized, however, that the section did not stand alone. Other sections imposed a tax of fifty cents per gallon upon whiskey and brandy from fruits manufactured in the state. The Court thus reasonably found that the interstate tax did not violate the Commerce Clause because it was "complementary" to the intrastate tax. *Id.* at 153. *Accord Maryland v. Louisiana*, 451 U.S. 725, 756 (1981).

Hinson and similar later cases[23] served as the doctrinal underpinning to this Court's 1926 decision in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), a case that presents a materially identical fact situation to the one here. In *General American*, nonresident railroad companies were assessed a Louisiana tax equal to 25 mills per dollar of the assessed value of rolling stock operated over any railroad in the state. Resident railroad companies were subject to varying local taxes imposed by Louisiana parishes and municipalities. Some local taxes exceeded 25 mills per dollar; other local taxes were less than 25 mills per dollar.

The lower court found the "average" of the local taxes was "approximately 25 mills." *Id.* at 373. The taxpayers, nonresident railroad companies, argued that the 25 mill per dollar tax imposed upon them but not upon resident railroad companies violated both the Commerce Clause and the Equal Protection Clause.[24]

---

[23] See, *e.g.*, *Travelers' Insurance Co. v. Connecticut*, 185 U.S. 364 (1902).

[24] The taxpayers also argued that the local tax rate was 21 mills rather than the 25 mills found by the trial court, and contended that the 4 mill disparity constituted discrimination. *Id.* This Court found, however, that the "record ... [did] not support appellants' contention." *Id.* at 374. The Court concluded that "appellant has therefore failed to show that the tax is discriminatory, either in principle or in its practical operation, and has laid no foundation for assailing its constitutionality." *Id.* at 375. In their brief, Petitioners claim this latter statement was the Court's holding, and that everything else in the case was "dicta". Petitioners' Brief, p. 30 n. 17. That is simply incorrect. The failure of proof in *General American* related solely to the taxpayers' failure to demonstrate that the lower court's finding of an average 25 mill tax rate was clearly erroneous. The Court's holding was that the average 25 mill tax rate for local businesses was approximately equal to the 25 mill rate imposed upon nonresidents, and therefore, no discriminatory purpose being shown, the tax did not violate the Commerce Clause. That holding is directly applicable here.

In a unanimous opinion written by Justice Stone, the Court rejected the taxpayers' argument and upheld the tax. Consistent both with *Hinson* and recent cases, the Court focused upon the combined practical effect of the challenged tax on nonresident companies and the varying local taxes on resident companies. The Court observed that it was "obvious" that the tax on nonresident companies was simply "in lieu of" the local taxes assessed against resident companies. *Id.* at 372. Because the two taxes were "substantially the equivalent," "there was no *unjust* discrimination" against interstate commerce. *Id.* at 373.

In language equally applicable here, the Court characterized its ultimate holding under the Commerce Clause as:

> "Where the taxing statute, which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against nonresident taxpayers, and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness." *Id.* at 373.[25]

General American is dispositive in this case. Its facts are virtually identical to those presented here, and its legal analysis

---

[25] The Court then went on to analyze and summarily reject the taxpayers' equal protection argument. *Id.* at 373. Petitioners' argument that *General American* is not applicable because "it was primarily an equal protection, not a Commerce Clause, case" is simply wrong. *See* Petitioner's Brief, p. 13. The analysis set forth above (which is dispositive here) is entirely from the Commerce Clause portion of the opinion. It would come as a surprise to Professors Hartman and Hellerstein, perhaps the two most respected scholars in this area, to learn that *General American* was primarily an equal protection case; both cited and discussed it in their analyses of Commerce Clause limitations on state taxation. Hartman, §2:19 at 128; Hellerstein, 39 Tax Lawyer at 410-11. Equally surprised would be Justice Cardozo, who discussed *General American* approvingly in his analysis of the Commerce Clause in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 585 (1937).

is fully consistent with this Court's current approach in compensatory tax cases. Indeed, the only conceivable distinction between *General American* and this case is the different nature of the taxes.

Any significance of that distinction, however, was put to rest by this Court in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). In that case, the Court expressly utilized and relied upon the principles established in *General American* and *Hinson* in applying the compensatory tax doctrine to sales and use taxes.[26]

At issue in *Silas Mason* was a Washington statute imposing a two percent tax on the use of chattels in that state. Another statute imposed a two percent tax on every retail sale in the state. Washington exempted from its use tax items that had already been subjected to a sales tax rate of two percent or greater. If the sales tax rate was less than two percent, the result of the exemption was that the use tax applied to the difference. *Id.* at 580-81[27]. Certain taxpayers, who brought into the state chattels

---

[26] Contemporary scholars likewise have recognized there is no material analytical distinction between "in lieu" taxes, like the one in *General American*, and other types of complementary taxes like sales and use taxes. *See, e.g.*, Hellerstein, 39 Tax Lawyer at 420 (1986). Thus, it is not surprising that this Court's analysis of "in lieu" cases has been virtually identical to its analysis of other complementary taxes. *See, e.g., Postal Telegraph Cable Co. v. Adams*, 155 U.S. 688, 698 (1895) ("In lieu" taxes will be sustained if they are the "just equivalent" of the taxes in lieu of which they are imposed). Professor Hellerstein observed that the *Postal Telegraph* holding "has been a cornerstone of constitutional doctrine ever since." Hellerstein, 39 Tax Lawyer at 421. *General American*, of course, further refined the "just equivalent" principle to a bright-line rule that if the "average" tax on intrastate commerce is higher than the corresponding tax on interstate commerce and no discriminatory purpose is shown, the latter tax does not violate the Commerce Clause.

[27] Petitioners' footnote reference to a supposed constitutional defect in Missouri's use tax credit, which has the same practical effect as the use tax

(Footnote 27 continued on next page)

for use in constructing the Grand Coulee Dam, challenged the use tax on Commerce Clause grounds.

Justice Cardozo, writing for a unanimous Court, began his analysis by examining the "practical effect" of sales-use tax:

> "One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales." *Id.* at 581.

He then characterized the question presented as:

> "Do these consequences which must have been foreseen, necessitate a holding that the tax upon the use is either a tax upon the operations of interstate commerce or a discrimination against such commerce obstructing or burdening it unlawfully?" *Id.*[28]

Justice Cardozo first easily disposed of the taxpayers' argument that the sales tax could not be considered because it was not in the same statute as the use tax, stating that:

> "There is no demand in [the] Constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power." *Id.* at 584 (quoting *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 480 (1932)).

He next examined the Court's prior cases which had held that burdens imposed by one state tax upon interstate commerce could be properly offset by burdens imposed upon intrastate commerce by other state taxes. Those cases, which included *Hinson* and *General American*, all supported the conclusion, Justice Cardozo opined, that use taxes are "complementary" and therefore not violative of the Commerce Clause. *Id.* at 585.[29]

(Footnote 27 continued)

exemption in *Silas Mason*, is puzzling, to say the least. Petitioners' Brief, p. 21 n. 12. Indeed, the Court in *Silas Mason* specifically observed that the essential effect of the exemption was that "[a] use tax is never payable where the user has acquired property by retail purchase in the state of Washington." 300 U.S. at 581. That is precisely the effect of Missouri's use tax credit. Moreover, as the Court in *Silas Mason* expressly noted, states are not constitutionally mandated to give credit for sales tax paid to another. *Id.* at 587. *See also Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 76-77 (1963)(Brennan, J., concurring); *Williams v. Vermont*, 472 U.S. 14, 21-22 (1985). That Missouri *does* credit sales tax paid to another state simply means that Missouri goes further to accommodate interstate commerce than is constitutionally required. In any event, Petitioners in the proceedings below did not challenge that credit, or any other provision of Missouri's underlying use tax law. They therefore may not do so now. *See* U.S. Supreme Court Rule 14.1(a); *Bacchus*, 468 U.S. at 267 n. 7.

[28] Under this Court's current Commerce Clause analysis, the first question — whether the tax constitutes a tax upon interstate commerce — is no longer relevant. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 285 (1977) (overruling *Spector Motor Service, Inc. v. O'Conner*, 340 U.S. 602 (1951)). The other question articulated by Justice Cardozo — whether the taxing scheme in "practical effect" constituted an undue burden on interstate commerce — is identical to this Court's current methodology. *See, e.g., Quill*, 112 S.Ct. at 1913 (The Commerce Clause prohibits taxes that "pass an *unfair* share of the tax burden onto interstate commerce" and thereby "*unduly* burden interstate commerce")(emphasis added); *Complete Auto*, 430 U.S. at 279 (Admonishing that courts must consider "not the formal language of the tax statute but rather its practical effect" in considering Commerce Clause issues).

[29] Justice Cardozo obviously did not view *General American* as inconsistent with *Silas Mason*: he incorporated *General American* in his analysis. Therefore, his observation that "[e]quality is the theme that runs through all the sections of the statute", 300 U.S. at 583, cannot reasonably be read, as Petitioners suggest, to mean that there cannot be a single possible "instance"

(Footnote 29 continued on next page)

Justice Cardozo then considered the taxpayers' attempt to "stigmatize" the use tax as a "protectionist tariff." *Id.* at 586. That argument is identical to Petitioners' attempt to stigmatize §144.748 as "patently protectionist". *See* Petitioners' Brief p. 13. After reaching the "common sense conclusion" that it was not, *id.* at 584, Justice Cardozo warned future courts not to be misled by the use of such conclusory labels:

> "Catch words and labels, such as the words 'protective tariff,' are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard." *Id.* at 586.

Finally, Justice Cardozo recognized, in language equally pertinent here, that federal courts should allow the states considerable latitude to develop taxing statutes that best meets their needs:

> "To contend [that the tax is unconstitutional] would be to deny that a state may develop its scheme of taxation in such a way as to rid its exactions of unnecessary oppression . . . A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. . . A legislature has a wide range of choice in classifying and limiting the subjects of taxation." *Id.* at 586-87.

(Footnote 29 continued)

of discrimination. As pointed out above, the taxing scheme in *General American* allowed for possible "instances" of discrimination in localities where the "in lieu" tax was greater than the local property tax. *See also Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969) (similarly upholding a complementary tax scheme which allowed for possible instances of discrimination). *General American* nonetheless upheld the tax because the "average" local property tax was approximately equal to the "in lieu" tax. Here the "average" local sales tax is 20% *less* than the local use tax; *a fortiori*, Missouri's sales-use tax statutes do not violate the Commerce Clause.

Silas Mason thus stands for the proposition that use taxes are "compensatory" or "complementary" to sales taxes in the same manner that the "in lieu" taxes in *Hinson* and *General American* were complementary to property taxes. Indeed, because a use tax reaches virtually identical events, and certain types of "in lieu" taxes may not (as this Court's later precedents make clear), the use tax perhaps is a better example of a classic "compensatory" tax than is the "in lieu" tax.

The *General American/Silas Mason* approach has not become outdated, as Petitioners claim, but is reflected in this Court's more recent compensatory tax cases. For example, in *Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969), this Court considered a Commerce Clause challenge by a North Carolina photography firm to an Alabama tax on "transient or traveling photographer(s)." The tax was $5 per week for each county, town, or city in which the photographer conducted business. *Id.* at 538. By contrast, for photographers who conducted their business "at a fixed location," Alabama imposed taxes which varied in different localities across the state. Those taxes ranged from $3 to $25 per location per year, depending on the size of the city. *Id.* at 538 n. 2.

Thus, as in *General American* (and this case), there were "instances" in which out-of-state businesses would be taxed at a higher rate than in-state businesses.[30] Indeed, in certain areas in the state, an out-of-state photographer would pay a greater tax than an in-state single location photographer in *every* instance. In other areas of the state, the out-of-state photographer would pay a greater tax if he conducted business in Alabama more than a certain number of weeks.

This Court nonetheless upheld the tax. It held that "[o]n the record before us, there is no basis for concluding that the $5 per

---

[30] By definition, "fixed location" businesses were in-state while out-of-state businesses would always be "transient".

week tax on transient out-of-state photographers is *so disproportionate* to the tax imposed on photographers with a fixed location as to bear *unfairly* on the former." *Id.* at 542 (emphasis added).[31]

Dunbar-Stanley thus is perfectly consistent with *General American* and *Silas Mason*, and with this Court's more recent decisions in *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987) and *Quill*, 112 S.Ct. 1904. The Court considered the relative burdens on interstate and intrastate commerce imposed by two distinct taxes, and concluded that the tax on interstate commerce did not *over*compensate for the burden imposed upon intrastate commerce by the local tax. To use *Quill's* phraseology, the Court ruled that the tax did not pass an "unfair" share of the tax burden onto interstate commerce and thus did not "unduly burden" interstate commerce. *Quill*, 112 S.Ct. at 1913.

These cases demonstrate that Petitioners' novel legal theory is inconsistent with this Court's precedents. As pointed out above, the tax schemes in *Dunbar-Stanley* and *General American* allowed for possible "instances" of discrimination, but this Court nonetheless upheld the taxes because *overall*, they did not unfairly burden interstate commerce. Those cases are directly applicable here.

---

[31] To be sure, part of the Court's decision in *Dunbar-Stanley* was based upon the taxpayer's failure to show that its photographers necessarily had been required to pay more than local photographers in the towns in which its photographers had conducted business. That same failure of proof, however, is equally present here. Petitioners have not shown, nor have they attempted to show, that out-of-state sellers, either individually or as a class, have suffered a net burden compared to in-state sellers. Thus, under *Dunbar-Stanley*, Petitioners' failure of proof alone is sufficient to uphold the lower court's decision. *Accord Interstate Busses Corp. v. Blodgett*, 276 U.S. 245, 251 (1928) ("To gain the relief for which it prays appellant is under the necessity of showing that in actual practice the tax of which it complains falls with disproportionate economic weight on it").

C. Missouri's Additional Use Tax Is A "Compensatory" Tax, Does Not Overcompensate For The Burden Upon Intrastate Commerce Caused By Missouri's Varying Local Sales Taxes, Is Not Protectionist And Therefore Does Not Violate The Commerce Clause.

Since the Court's 1937 decision in *Silas Mason*, the proposition that sales and use taxes are "compensatory" has been firmly established.[32] Because sales and use taxes, perhaps more than any other type of compensatory taxes, apply on "substantially equivalent events," they have become known as the "paradigm" of compensatory taxes. Hellerstein, 39 Tax Lawyer at 406. No one can reasonably question that Missouri's sales and use taxes apply to "substantially equivalent events." *See supra*, n. 7.

A determination that two different taxes reach substantially equivalent events, however, does not end the analysis. Rather, as this Court's cases from *Hinson* to *General American* to *Silas Mason* to *Dunbar-Stanley* to *Tyler Pipe* have made clear, "[t]he concept of a compensatory tax first requires identification of the burden for which the State is attempting to compensate." *Tyler Pipe*, 483 U.S. at 242.

Here, there is no reasonable question that in enacting the Additional Use Tax, Missouri was attempting to compensate for the burden imposed upon intrastate commerce by varying local sales taxes. The legislature was aware that those rates varied from 3.5% to 0%, and that the average local sales tax rate

---

[32] Indeed, the *only* case in which this Court has invalidated a sales-use tax scheme involved a scheme that was plainly protectionist. *Halliburton*, 373 U.S. 64. In *Halliburton*, the sales tax base was more narrow than the use tax base, thus resulting in across-the-board discrimination against out-of-state sellers in every case. As pointed out above, that situation does not exist here; Missouri's sales and use tax bases are the same. *See* §§144.010.1(3) and 144.605(8).

exceeded 1.8%. Its decision to impose a 1.5% use tax rate, some twenty percent *less* than the average local sales tax rate, therefore *under*compensated for the burden imposed upon intrastate commerce by those local sales taxes. For one year alone, the trial court found the net burden to *intra*state commerce resulting from that undercompensation was $100,000,000. In these circumstances, the Additional Use Tax does not come close to violating the Commerce Clause.

Far from being "patently protectionist," as Petitioners claim, §144.748 represents a legitimate — and conservative — attempt to require those involved in interstate commerce to pay their "just share" of the state tax burden. *Commonwealth Edison*, 453 U.S. at 623-24. Missouri erred on the side of favoring *inter*state commerce, not *intra*state commerce. This Court has never invalidated a state tax with such a decidedly pro-interstate commerce tilt. It should not begin now.

D. No "Better" Alternatives Have Been Suggested.

Because §144.748 does not discriminate against interstate commerce, the state has no burden to "justify" that statute by showing it could not have accomplished its goals by less discriminatory alternatives.[33] In any event, no better alternatives have been suggested.

The administrative inconvenience to out-of-state sellers imposed by one of Petitioners' suggested alternatives — varying local use tax rates — itself would substantially burden interstate

[33] *Cf. New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988)("Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives").

commerce far more than the present system.[34] In fact, this Court recently made that very point. In *Quill*, the Court noted that varying local tax rates in over 6000 local taxing jurisdictions would subject interstate sellers to "many variations in rates of tax, . . . allowable exemptions, and . . . administrative and record-keeping requirements [which] could entangle [them] in a virtual welter of complicated obligations." 112 S.Ct. at 1913 n. 6. (quoting *National Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753, 759-760 (1967)). The Court flatly stated this cumbersome process imposed by such "a state tax might unduly burden interstate commerce."[35]

The varying local rates "solution" also would result in a substantial increase in the burden on interstate commerce in "dollars and cents." *See Halliburton*, 373 U.S. at 70. The average local sales tax rate exceeds 1.8%. The "local" component of Missouri's use tax is 1.5%. Mandating "equal" rates in each jurisdiction would therefore result in an effective increase in the local use tax rate of over 20%. It is difficult to conceive how raising the average use tax, which standing alone burdens

[34] If Missouri mandated by statute that each local jurisdiction adopt a local use tax equal to its local sales tax, interstate sellers with a substantial nexus to Missouri, who under *Quill* are required to collect the tax, would be faced with the prospect of determining for *each* purchaser the aggregate use tax in effect in the particular local jurisdiction in which the purchaser first exercises the privilege of "storing, using or consuming" the purchased item. For some purchases, that may occur in the jurisdiction of the purchaser's residence; in other situations it may not. For interstate sellers with multi-state operations, the task of determining both the applicable jurisdiction and the aggregate use tax rate currently in effect in that jurisdiction would be burdensome. (*See* L.F. 147-50).

[35] By contrast, a uniform use tax avoids the problem and results in less administrative cost to the out-of-state seller. (*See* L.F. 147-50, Affidavit of F. Joe DeLong: "A state wide uniform rate for use taxes for local purposes creates much lesser administrative burdens and costs where there are varying local use taxes").

interstate commerce, would somehow be more constitutionally permissible than keeping the use tax rate where it is.[36]

The other "solution" suggested by Petitioners is to outlaw constitutionally local sales and use taxes altogether, and mandate that the state-wide sales tax be identical to the state-wide use tax. To be sure, that approach may well eliminate Commerce Clause concerns, but would do so by federal court usurpation over the states' traditional power to allocate tax burdens within their borders to accommodate local needs. Just this term, the Court reaffirmed that "[p]rinciples of federalism support, in fact compel, our view ... [that] limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty" must be considered with hesitation. *Oregon Revenue Dep't v. ACF Industries, Inc.*, No. 92-74 Slip Op., at 11 (January 24, 1994).[37]

A third supposed "solution" would eliminate Missouri's ability to impose a local use tax greater than the lowest local sales tax rate. That approach would not only create the same problems mentioned above with respect to varying local use tax rates, but would also be flatly inconsistent with this Court's holdings

---

[36] As noted by the Court below, the local varying rate approach raises additional Commerce Clause concerns as well. *See Associated Industries*, 857 S.W.2d at 192 (citing *American Modulars Corp. v. Lindley*, 376 N.E.2d 575 (Ohio 1978)).

[37] *See also San Antonio Independent School Dis't v. Rodriguez*, 411 U.S. 1, 40 (1973):

> "We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures."

Accord Silas Mason, 300 U.S. at 527-29. *Cf. Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 279-280 (1978).

which expressly permit states to tax their fair share of interstate commerce. *See D. H. Holmes*, 486 U.S. at 31. It would also impose upon localities an obligation to set their local sales tax rates at a more burdensome level to make up for the lost use tax revenues. Thus, the competitive disadvantage in-state firms now suffer would be increased.

In short, no suggested solution is "better" than Missouri's current system. Thus, assuming *arguendo* Missouri is required to "justify" its sales-tax structure by showing that it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," that test is more than met here.

II. PETITIONERS' CASES ARE FACTUALLY INAPPOSITE, DO NOT UNDERMINE GENERAL AMERICAN, AND SUPPORT AFFIRMANCE HERE.

Petitioners contend that the Commerce Clause requires invalidation of any state tax system which could possibly produce one "instance" of competitive advantage for an in-state business, regardless of whether its overall effect is beneficial to interstate commerce. Yet, no case cited by Petitioners supports that far-reaching proposition. In fact, all of Petitioners' cases implicitly reject that approach, and are consistent with the approach of *General American* and the courts below.

The only sales-use tax case relied upon by Petitioners is *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963). In *Halliburton*, the Louisiana sales and use tax rates were identical but applied to differing tax bases. It was *admitted* that the differing tax bases resulted in a net burden to out-of-state businesses. *Id.* at 66, 70. The lower court instead upheld the tax by characterizing the amount of discrimination as "incidental".

Id. at 70.[38] In rejecting Louisiana's proposed "incidental" burden exception to the Commerce Clause, the Court stated that:

> ". . . equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Id.* at 70.[39]

Unlike in *General American* and this case, the in-state sellers in *Halliburton* were *always* favored as a result of the differing tax bases. Conversely, out-of-state sellers were *always* at a competitive disadvantage. The economic result was therefore obvious — it was a mathematical certainty that, in "dollars and cents", interstate commerce would be negatively affected. That was true in every individual case, and on an overall basis.

Contrary to Petitioners' suggestion, *Halliburton* does not stand for the proposition that component parts of a complementary sales-use tax system are to be isolated and treated separately for purposes of Commerce Clause analysis. Rather, *Halliburton* reaffirmed the principles established in *Hinson*, *General American*, *Silas Mason* and *Dunbar-Stanley* that the "proper analysis must take '*the whole scheme of taxation into account*'."[40] *Id.* at 69 (emphasis added). Thus, far from undermining *General*

---

[38] After assessing the dollar discrepancy, this Court found that the "resulting tax inequality is clearly substantial". *Id.* at 71. By contrast, out-of-state businesses in Missouri have an overall advantage. Thus, the advisability of an "incidental" or *de minimus* exception to the Commerce Clause is not presented here.

[39] This Court later characterized *Halliburton* as holding that the use tax base cannot be broader than the sales tax base. *Williams v. Vermont*, 472 U.S. 14, 23 (1985). In Missouri, it is not. *Compare* §144.010.1(3) and §144.605(8).

[40] By contrast, Petitioners' analysis takes into account *only* the localities of Missouri in which Missouri's aggregate use tax rate exceeds the aggregate sales tax rate. It ignores the economic advantage which non-Missouri businesses enjoy within the Missouri marketplace where the aggregate sales tax rate exceeds the aggregate use tax rate. Thus, Petitioners' approach is inconsistent with *Halliburton*, the primary case upon which they rely.

American, *Halliburton* supports Justice Stone's rationale and holding.

Another case relied upon by Petitioners, *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), addressed a Pennsylvania marker fee tax and an axle tax on each motor carrier vehicle operating on Pennsylvania highways. The taxes were assessed at a flat dollar amount and, therefore, did not vary with the number of miles in which a particular vehicle traveled on the Pennsylvania highways during the year. The evidence showed that "[o]n the average, the Pennsylvania-based vehicles subject to the flat taxes travel about five times as many miles on Pennsylvania roads as do the out-of-state vehicles; correspondingly, the cost per mile of each of the flat taxes is approximately five times as high for out-of-state vehicles as for local vehicles." *Id.* at 276. The Court found that "[i]n practical effect, since they impose a cost per mile on appellants' trucks that is approximately five times as heavy as the cost per mile borne by local trucks, the taxes are plainly discriminatory." *Id.* at 286.

Scheiner does not support overruling *General American* as Petitioners suggest. To the contrary, it approves an analysis which focuses upon the "average" tax burden imposed on interstate and intrastate commerce. Indeed, the average tax imposed on interstate commerce was the controlling factor in both cases. The material distinction between them is that in *Scheiner*, the scale discriminatorily tipped against interstate commerce whereas in *General American*, it did not. *Scheiner's* rationale is thus consistent with that of *General American* and the decision below.

Another case relied upon by Petitioners, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), is far afield from the situation presented here and in *General American*. Indeed, *Bacchus* is not a compensatory tax case at all. In *Bacchus*, Hawaii imposed a 20% excise tax on sales of liquor at wholesale. To stimulate and encourage production of certain brandy and pineapple wine

manufactured locally, those items were exempted from the tax. The Court found that the exemptions had both a discriminatory purpose and discriminatory effect, and therefore constituted "'economic protectionism' in every sense of the phrase." *Id.* at 272. The state did not dispute the protectionist nature of the exemptions. *Id.* at 271. Rather, it argued for a "*de minimis*" exception to the Commerce Clause. *Id.* at 268-69. As in *Halliburton*, that argument was rejected. *Id.* at 269.

In contrast to *General American* and this case, the exemptions in *Bacchus* were not part of a compensatory system of taxation and had only one effect — to provide an economic advantage to sellers of local products. The exemptions *always* placed sellers of other comparable products at a competitive disadvantage. That case therefore provides little guidance here.

Maryland v. Louisiana, 451 U.S. 725 (1981), addressed a Louisiana "first use" tax on oil and gas piped into Louisiana from the Outer Continental Shelf (OCS). Exemptions from the tax applied where the OCS gas was used in certain commercial operations located in Louisiana. In addition, a credit applied against the tax for any Louisiana severance tax imposed on the extraction of oil and gas from Louisiana soil.

The Special Master recognized that by design and effect, the "first use" tax favored local interests. Nevertheless, he recommended that further evidentiary hearings be conducted to determine the extent to which it "compensated" for the Louisiana severance tax. *Id.* at 758.

This Court rejected that recommendation. It ruled that because the severance tax and the first use tax did not tax substantially equivalent events, the latter could not be considered a "compensatory" tax. *Id.* at 758-59 ("The two events are not comparable in the same fashion *as a use tax complements a sales tax*") (emphasis added). The Court therefore ruled that because the first use tax, standing alone, "undeniably violates the principle of equality", *id.* at 759, the tax clearly violated the Commerce Clause.

The facts of *Maryland v. Louisiana* are poles apart from that of *General American* and this case. Because the "first use" tax, unlike the taxes in *General American* and this case, was not "compensatory" to Louisiana's severance tax, it was analyzed in isolation and "unquestionably discriminate[d] against interstate commerce" both on its face and in its practical effect. *Id.* at 756. Whether the first use tax, if considered in conjunction with the severance tax, would unduly burden interstate commerce was not presented in *Maryland v. Louisiana*. Thus, *Maryland v. Louisiana* did not reach the issue presented here.[41]

Similarly misplaced is Petitioners' reliance on *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988). In that case, (which again did not involve a compensatory tax at all), an Ohio statute provided a tax credit against the Ohio Motor Vehicle Fuel Sales Tax for sales of ethanol. The credit, however, applied only with respect to ethanol produced in Ohio or in a state which on a reciprocal basis granted similar tax credits for Ohio-produced ethanol when sold in the other state.

Other than an argument concerning the reciprocity of the tax credit,[42] the State of Ohio essentially did not dispute the fact that

[41] Two other cases relied upon by Petitioners, *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) and *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987), both involved the same issue presented in *Maryland v. Louisiana*: whether two different types of taxes reached "substantially equivalent events," and therefore could be considered "compensatory". That is far different than *General American* and this case, where the taxes did and do apply to substantially equivalent events, and therefore are truly compensatory.

[42] Unlike the situation in *New Energy*, the advantage provided to interstate commerce in our case is not hypothetical or dependent on legislation of sister states but rather is simply the functional result of the Missouri sales-use tax system.

the tax credit facially discriminated against interstate commerce and constituted economic protectionism. Rather, the State argued that the discrimination was justified because, among other things, the amount of discrimination was limited. As it did in *Halliburton* and *Bacchus*, the Court rejected that argument, and invalidated the tax credit.[43]

Thus, *New Energy* is neither applicable here, nor inconsistent with *General American*. The tax credit in *New Energy*, unlike Missouri's sales-use tax statutes, gave in-state ethanol producers an undeniable economic advantage in the Ohio marketplace. Out-of-state competition on the other hand was *always* disadvantaged. Under *General American*, that type of credit likewise would have been invalidated.

Wyoming v. *Oklahoma*, ___U.S.___, 112 S. Ct. 789 (1992), another case relied upon by Petitioners, did not involve taxes at all, but rather an Oklahoma statute which required Oklahoma utility companies to burn a mixture of coal which consisted of at least 10% Oklahoma-mined coal. In holding that the statute discriminated against interstate commerce, the Court stated that "[s]uch a preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory, for the Act purports to exclude coal mined in other States based solely on its origin." *Id.* at 800.

The facts of *Wyoming v. Oklahoma* are easily distinguishable. There, the statute simply operated as an unmitigated preference for Oklahoma-mined coal. As in other cases cited by Petitioners, the State essentially did not dispute the protectionist nature of the statute, but rather, argued that the patent discrimination was justified by counterveiling considerations. The result, however, was inescapable — Oklahoma coal was *always* provided a

[43] Here, not only is discrimination not "patent," 486 U.S. at 276, there is no discrimination against interstate commerce at all.

preference over out-of-state coal to the extent of the 10% required usage.[44]

In *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), a New York statute provided a credit against the corporate franchise tax imposed on the income of a Domestic International Sales Corporation ("DISC"). The credit, however, was provided only with respect to income derived from the exportation of products from a "regular place of business of the taxpayer within [New York]." *Id.* at 393.[45]

In holding that the credit discriminated against interstate commerce in violation of the Commerce Clause, the Court described the local favoritism as follows:

> "Thus, not only does the New York tax scheme 'provide a positive incentive for increased business activity in New York State' . . . but also it penalizes increases in the DISC's shipping activities in other States." *Id.* at 400-401.

The facts in *Westinghouse* are clearly inapposite to the facts in this case and in *General American*. The undisputed purpose of the DISC credit was to "provide a positive incentive for increased business activity in New York State." *Id.* at 393. The DISC credit also discriminated in practical effect against out-of-

[44] Three other non-compensatory tax cases relied upon by Petitioners similarly involved admittedly isolationist legislation. *See Chemical Waste Management, Inc. v. Hunt*, ___ U.S. ___, 112 S.Ct. 2009 (1992); *Ft. Gratiot Landfill v. Michigan Dep't of Natural Resources*, ___ U.S. ___, 112 S.Ct. 2019 (1992); and *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In each case, this Court simply examined the statute to determine whether it was "basically a protectionist measure." *Philadelphia v. New Jersey*, 437 U.S. at 624. After finding that the practical effect of each statute was to allow the jurisdiction "to isolate itself from the national economy," *Fort Gratiot*, 112 S.Ct. at 2024, this Court found all three to be violative of the Commerce Clause. None of those cases bears any resemblance to the facts presented here.

[45] Therefore, the amount of the credit was directly related to the percentage of the DISC'S total exporting activities originating from New York. *Id.* at 400.

state exporting activities as a class and therefore unduly burdened such activities on an overall basis. That situation did not exist in *General American* and does not exist here.[46]

Similarly, in *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977), New York imposed a transfer tax on the sale of securities in which any part of the transaction occurred within New York. The rate of tax, however, was heavier on a nonresident of New York if the ultimate sale of the security occurred on a securities exchange other than one located in New York. Thus, the practical effect of the tax differential was to provide New York securities exchanges an advantage over security exchanges located in other states. *Id.* at 326-27. The tax differential *always* favored New York exchanges over securities exchanges located in other states. Therefore, the Court held the tax to be violative of the Commerce Clause because "[t]he obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges." *Id.* at 331. The factual circumstances of *Boston Stock Exchange* are patently distinguishable from that of *General American* and this case.

A finding of economic protectionism likewise was dispositive in another of Petitioners' non-compensatory tax cases. In *Polar Ice Cream & Creamery v. Andrews*, 375 U.S. 361 (1964), Florida regulations required milk distributors within a certain region of Florida to purchase their milk within that region. Only if no milk was available from that region would the distributors be allowed to purchase milk produced out-of-state. Noting that the Florida

[46] An equally straightforward case of local favoritism was presented in another of Petitioners' cases, *Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance*, ___ U.S. ___, 112 S.Ct. 2365 (1992). There, Iowa's income tax statutes allowed a corporate deduction for dividends received from a U.S. subsidiary. No deduction, however, was provided for dividends received from a foreign subsidiary. The tax therefore undeniably discriminated against foreign subsidiaries both individually and as a class. *See id.* at 2368. Like *Westinghouse*, *Kraft* has little to do with *General American* or this case.

regulatory scheme in effect "reserves to its local producers a substantial share of the Florida milk market," 375 U.S. at 375, the Court held it violative of the Commerce Clause.

For obvious reasons, *Polar Ice* has no application to this case or to *General American*. *Polar Ice* is simply another case of isolationism and blatant economic protectionism in which in-state economic interests were *always* favored over out-of-state interests.[47]

In summary, none of Petitioners cases resemble the factual situation presented in *General American* and in this case. All are fully consistent with *General American's* rationale and holding, and with that of the Court below. They provide no basis for overruling *General American* or reversing the lower court's sound decision. This Court therefore should do neither.

III. GENERAL AMERICAN SHOULD NOT BE OVERRULED.

Tacitly conceding that *General American* is dispositive on the facts presented in this case, Petitioners call upon this Court to overrule that long-standing precedent.[48] They claim that *Gen-*

[47] Another state law favoring local milk businesses was similarly invalidated in *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). There, an ordinance prohibited the sale of milk labeled as pasteurized unless it had been processed and bottled within a five mile radius of the city. In addition, the ordinance, in effect, prohibited the sale of milk originating beyond 25 miles of the city. As with *Polar Ice*, the isolationism and blatant economic protectionism of *Dean Milk* distinguish it from *General American* and this case.

[48] Assuming this Court decides to overrule *General American* (it should not), that ruling should be applied prospectively only based on the three-pronged test of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *See American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 169 (1990). Alternatively, this case should be remanded with directions to determine whether each prong of the *Chevron Oil* analysis has been satisfied in the instant case. Respondent acknowledges the Court's holding in *Harper v. Virginia Dep't of Taxation*, ___ U.S. ___, 113 S.Ct. 2510 (1993), but that case should be limited to its facts.

eral American is inconsistent with this Court's precedents, that it is a "derelicit hazard confusing the lower courts," and therefore should be "moored to its facts or sunk." Petitioners' Brief, p. 29.

Only in compelling and rare circumstances, however, has this Court chosen to overrule its precedents. As this Court recently recognized in *Planned Parenthood of South-Eastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 2808 (1992):

> "The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, The Nature of the Judicial Process 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. See Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed."

The Court in *Planned Parenthood* articulated a "series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Id.* Those considerations, none of which were directly addressed by Petitioners or their Amicus, are:

> "(1) Whether the rule has proved to be intolerable simply in defying practical workability;
>
> (2) Whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation;

> (3) Whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and
>
> (4) Whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.* at 2808-09.

Under the first factor, in no sense can the rule of *General American* be deemed to defy "practical workability." Determining the "average" local tax rate merely requires a simple mathematical calculation with readily available data. The other prong of *General American*, whether the tax is discriminatory "in purpose," likewise easily falls within a court's "judicial competence." *Planned Parenthood*, 112 S.Ct. at 2809. Thus, the first factor strongly weighs in favor of not overruling *General American*.

With regard to the second factor, the State of Missouri, and other states, have relied upon *General American* in devising their tax systems. If *General American* is overruled, not only would Missouri be required to revamp its sales-use tax statutes, but it and other states would be required to reexamine all "in lieu" taxes, taxes like those in *Dunbar-Stanley* and a host of other taxes that were enacted in reliance upon *General American*. For this reason, this Court should be particularly hesitant to overrule precedents in the area of state taxation, which is an essential component of state sovereignty.

The third factor, whether the rule is no more than a "remnant of an abandoned doctrine," likewise counsels against overruling *General American*. As Sections I and II of this brief demonstrate, *General American* is fully consistent with this Court's current Commerce Clause jurisprudence. Like *Maryland v. Louisiana*, *General American* recognized that the constitutionality of a "state tax must be assessed in light of its actual effect considered in conjunction with other portions of the state's tax

scheme." *Maryland v. Louisiana*, 451 U.S. at 756. Consistent with *Tyler Pipe* and *Maryland v. Louisiana*, the Court in *General American* recognized that the "concept of a compensatory tax first requires identification of the burden for which the State is attempting to compensate." *Tyler Pipe*, 483 U.S. at 242 (quoting *Maryland v. Louisiana*, 451 U.S. at 758.)[49] Like *Complete Auto*, *General American* "considered not the formal language of the tax statute but rather its practical effect." *Complete Auto*, 430 U.S. at 279.[50] Like *Wyoming v. Oklahoma*, *Philadelphia v. New Jersey*, *Fort Gratiot*, and *Bacchus*, *General American* focused upon whether challenged statute constituted "economic protectionism."[51] Consistent with the teachings of *Quill* and *Commonwealth Edison*, *General American* analyzed whether the tax placed "an *unfair* share of the tax burden onto interstate commerce" and thereby "*unduly* burden[ed] interstate commerce", *Quill*, 112 S.Ct. at 1913 (emphasis added), or whether the state merely was attempting to tax its "just share" of interstate commerce, *Commonwealth Edison*, 453 U.S. at 623-24.[52]

General American further provides, in accordance with *Quill*, a "bright-line rule in the area of sales and use taxes." *Quill*, 112 S.Ct. at 1915. Under *General American*, if the average tax rate on intrastate commerce is less than the tax rate on interstate commerce, the tax does not violate the Clause.[53] Like *Dunbar-*

[49] In *General American* that "burden" was the combined effect of the varying local property taxes imposed upon Louisiana residents. 270 U.S. at 372.

[50] *General American* focused upon the "practical operation" of the tax. 270 U.S. at 375.

[51] *See, e.g., General American*, 270 U.S. at 372-73.

[52] See, *e.g., General American*, 270 U.S. at 373.

[53] That assumes, of course, no protectionist purpose is shown. Here, no purpose to discriminate has been shown or is evident from the statute. Indeed, the Additional Use Tax results in *less* of a burden to interstate commerce, both in both "dollars and cents" and in "practical operation," than its repealed predecessor.

Stanley, *General American* focused not upon whether a state taxing scheme might allow for possible "instances" of unequal treatment, but upon whether the *overall* effect of the state's tax system "unfairly" burdened interstate commerce. *Dunbar-Stanley*, 393 U.S. at 542. *General American*, like *Halliburton*, measured that burden "in dollars and cents, not legal abstractions." *Halliburton*, 373 U.S. at 70. Thus, far from a "remnant of an abandoned doctrine," *General American* remains vital today.

Finally, no "facts have changed or come to be seen differently" so as justify overruling *General American*. Thus, all the *Planned Parenthood* factors convincingly illustrate why *General American* should not be overruled.

Because *General American* is fully consistent with this Court's current Commerce Clause jurisprudence and the underlying anti-protectionist purpose of the Commerce Clause itself, it is not, as Petitioners claim, a "derelict hazard confusing the lower courts." It instead provides a useful benchmark upon which future courts (and States in devising their tax systems) may reasonably rely. Thus, *General American* should not be "moored to its facts or sunk," as suggested by Petitioners, but used as one "bright-line" beacon in an otherwise murky sea of Commerce Clause jurisprudence.

Conclusion

For the reasons stated above, the sound decision of the Missouri Supreme Court should be affirmed.

JEREMIAH W. (JAY) NIXON
Attorney General

DON M. DOWNING
Deputy Attorney General
(Counsel of Record)

GRETCHEN GARRISON
Assistant Attorney General

JEFFREY K. ELNICKI
Assistant Attorney General

P.O. Box 899
Jefferson City, MO 65102
(314) 751-8871

Attorneys for Respondent
Janette M. Lohman,
Director of Revenue